IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD MCNEAL, JR.	:	CIVIL ACTION
Plaintiff	:	NO. 99-3229
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	CRIMINAL ACTION
Defendant	:	NO. 94-467-2

MEMORANDUM AND ORDER

YOHN, J. November , 1999

Plaintiff Richard McNeal, Jr., pleaded guilty to bank robbery, conspiracy to commit bank robbery, and possession of a firearm in relation to a crime of violence in violation of 18 U.S.C. §§ 371, 2113(d), and 924(c), respectively. After a hearing, the court denied McNeal's motion to withdraw his guilty plea and sentenced him to 192 months imprisonment. The Third Circuit upheld his conviction, *see United States v. McNeal*, 164 F.3d 621 (1998), and the Supreme Court denied his petition for certiorari. *See McNeal v. United States*, 119 S. Ct. 888 (1999). McNeal now challenges his conviction and sentence with a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, raising claims of ineffective assistance of counsel, a jurisdictionally defective indictment, and lack of jurisdiction of the trial court. Upon consideration of McNeal's motion (Doc. No. 137), his Memorandum of Facts and Law in Support of Motion to Vacate Pursuant to Title 28 U.S.C. § 2255 (Doc. No. 135) ["McNeal Mem."], the government's response (Doc. No. 139), and McNeal's reply (Doc. No. 140), the court will deny his motion.

I. Legal Standard

A § 2255 motion is the proper vehicle for challenging a conviction and sentence on the basis of ineffective assistance of counsel. *See, e.g.*, *United States v. Sandini*, 888 F.2d 300, 312 (3d Cir. 1989) (considering a § 2255 challenge of a conviction based on ineffective assistance of counsel). A § 2255 motion is not, however, the proper vehicle for making a non-facial challenge of an indictment or for relitigating a claim already decided on direct appeal. *See United States v. DeRewal*, 10 F.3d 100, 105 n.4 (3d Cir. 1993) (recognizing that a § 2255 motion may not be used to challenge a claim already considered on direct appeal); *Hall v. United States*, 410 F.2d 653, 659 (4th Cir. 1969) (stating that an indictment can be challenged in a habeas petition only if the indictment fails on its face to charge an offense); *Scott v. United States*, 231 F. Supp. 360, 362 (D.N.J. 1964) (same), *aff'd*, 342 F.2d 813 (3d Cir. 1965).

The cause of action for ineffective assistance of counsel flows from the Sixth Amendment right to counsel, which exists "in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984). To succeed with a claim for ineffective assistance of counsel, the petitioner must show (1) that his attorney's performance was objectively deficient and (2) prejudice to his defense. *See Strickland*, 466 U.S. at 687-90; *Deputy v. Taylor*, 19 F.3d 1485, 1493 (3d Cir. 1994). In considering whether the attorney's performance was objectively deficient, the court must defer to counsel's tactical decisions, must not employ hindsight, and must give counsel the benefit of a strong presumption of reasonableness. *See Deputy*, 19 F.3d at 1493. In considering whether prejudice resulted from an objectively deficient performance in the context of a guilty plea, "the defendant must show that

there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

II. Discussion

A. Ineffective Assistance of Counsel

McNeal's ineffective assistance of counsel claims stem from his belief that the district court in which he pleaded guilty to bank robbery lacked jurisdiction over the crime. *See* McNeal Mem. at 8. Federal jurisdiction of McNeal's bank robbery charge depended on the target bank's deposits having been insured by the Federal Deposit Insurance Corporation ["FDIC"]. *See* 18 U.S.C. § 2113(f). McNeal has concluded that federal jurisdiction was lacking based on two documents: (1) a letter he received from an FDIC paralegal specialist that stated that the FDIC did not insure Meridian Bank, the target bank, against robbery when the crime was committed in 1994, McNeal Mem. Ex. 6, and (2) a 1986 FDIC certificate of insurance for Meridian Bank that was submitted by the government on direct appeal as an exhibit to support federal jurisdiction but that was deemed insufficient to establish FDIC coverage in 1994.[1] McNeal Mem. Ex. 5; *see United States v. McNeal*, No. 97-1227, slip op. at 3 (3d Cir. July 31, 1998).

McNeal's reliance on the letter from the FDIC paralegal specialist reveals a misunderstanding of the jurisdictional provisions of 18 U.S.C. § 2113(f), which make the federal bank robbery statute applicable to any bank the deposits of which are insured by the FDIC. *See*

[1]The Third Circuit also noted that McNeal's guilty plea conclusively established the factual predicates of federal jurisdiction, including FDIC insurance of Meridian Bank's deposits in 1994, thereby relieving the government of the burden of furnishing any proof to that effect. *See McNeal*, slip op. at 4.

id. As the FDIC paralegal specialist writes in her letter to McNeal, the FDIC does not insure bank deposits against robbery but against insolvency. *See* McNeal Mem. Ex. 6. Thus, McNeal is simply incorrect in concluding that the district court lacked jurisdiction based on the letter from the FDIC paralegal specialist that stated that Meridian Bank was not insured by the FDIC against robbery. *See id*. at 16.

McNeal alleges that his trial counsel, Paul Hetznecker, should not have concluded that the government could prove that Meridian Bank was insured by the FDIC simply because the indictment included language to that effect. *See* McNeal Mem. at 12. McNeal also claims that Hetznecker did not sufficiently investigate Meridian Bank's coverage by FDIC insurance. *See id*. at 14. Further, McNeal claims that his appellate counsel, Robert Hoof, was ineffective because he failed to raise the issue of lack of jurisdiction on appeal. *See id*. at 17.

The court cannot find any objective deficiency in Hetznecker's decision to accept the government's assertion that Meridian Bank was insured by the FDIC and not to investigate this issue any further. Considering the ease with which the government could have proved that Meridian Bank was FDIC insured in 1994 and the absence of any likely benefit to be gained by contesting this issue, Hetznecker's strategic decision was reasonable. The court holds that McNeal fails to demonstrate any objective deficiency in Hetznecker's decision not to pursue the issue of Meridian Bank's coverage by FDIC insurance. The court also holds that McNeal fails to show a reasonable probability that, had Hetznecker pursued the issue of jurisdiction, McNeal would not have pleaded guilty but would have gone to trial. Thus, McNeal has not satisfied either prong of the *Strickland*/*Hill* test with respect to Hetznecker's assistance as McNeal's trial counsel.

McNeal's claim that his appellate counsel was ineffective is similarly baseless. McNeal argues that Hoof should have raised the jurisdictional issue on appeal and that his failure to do so was constitutionally deficient. *See* McNeal Mem. at 17. Although Hoof did not raise this issue, McNeal himself raised it in a pro se appeal of his conviction to the Third Circuit. *See McNeal*, slip op. at 4. The Third Circuit held McNeal's "jurisdictional argument [to be] without merit." *Id*. The court holds that Hoof's decision not to raise a meritless argument was objectively reasonable and not prejudicial to McNeal. Thus, McNeal also fails to satisfy either prong of the *Strickland* test with respect to Hoof's assistance as McNeal's appellate counsel.

Because McNeal has satisfied neither prong of both the *Strickland*/*Hill* test for his trial attorney's performance and the *Strickland* test for his appellate attorney's performance, the court holds that he has not demonstrated the ineffective assistance of either counsel.

B. Facial Inadequacy of the Indictments

McNeal argues that the indictment and the superseding indictment were inadequate because the jurisdictional assertions therein were unfounded and incorrect. *See* McNeal Mem. at 19. McNeal bases this argument not on the language of the indictment itself but on the facts underlying the indictment (i.e., the facts revealed by the letter from the FDIC paralegal specialist and the FDIC certificate of insurance). *See id*. at 20. Thus, McNeal does not challenge the facial adequacy of the indictments. Because McNeal does not allege that the indictments fail on their face to charge an offense, and because that is the only method by which an indictment can be attacked in a § 2255 motion, the court holds that McNeal's claim that the indictments were

jurisdictionally defective fails. *See Hall v. United States*, 410 F.2d 653, 659 (4th Cir. 1969); *Scott v. United States*, 231 F. Supp. 360, 362 (D.N.J. 1964), *aff'd*, 342 F.2d 813 (3d Cir. 1965).[2]

C. Jurisdiction of the Trial Court

McNeal claims that the trial court did not have jurisdiction to accept his guilty plea. *See* McNeal Mem. at 22. Because McNeal already made this argument when directly appealing his conviction and had it rejected by the Third Circuit, *see McNeal*, slip op. at 4 (holding that McNeal's jurisdictional argument was meritless), the court holds that McNeal may not relitigate this claim in his § 2255 motion. *See DeRewal*, 10 F.3d at 105 n.4.

III. Conclusion

For all of the foregoing reasons, the court will deny McNeal's § 2255 motion. An appropriate order follows.

[2]Even if McNeal had alleged that the indictments were facially inadequate, the court would disagree with McNeal's allegations and agree with the Third Circuit's statement that "[t]he indictment clearly charged McNeal with robbing a federally insured banking institution." *See McNeal*, slip op. at 3.

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ORDER

YOHN, J. November , 1999

AND NOW, this day of November, 1999, upon consideration of plaintiff McNeal's § 2255 motion (Doc. No. 137), his Memorandum of Facts and Law in Support of Motion to Vacate Pursuant to Title 28 U.S.C. § 2255 (Doc. No. 135), the government's response (Doc. No. 139), and McNeal's reply (Doc. No. 140), IT IS HEREBY ORDERED that the § 2255 motion is DENIED.

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William H. Yohn, Jr.